

Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions

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Introduction

As you return from a Continuing Legal Education course in estate planning, you pick up your luggage and notice that the suitcase in which you packed your government-issued laptop is damaged. You plug in the laptop, only to find that it does not work. You kick yourself for packing it and file a claim with the airline. On the trip home, you wonder whether you can accept the check the airline will be sending you to repair the laptop.

The following Monday, you discover several phone messages from the head of Friends of the United States,¹ an international private organization (IPO). You know from past experience that this is not a group you want to deal with when you have the laptop question on your mind. The IPO wants to buy six new Pentium computers with the “works” and donate them to the General and his staff.

Both of the scenarios above involve fiscal law. Although most military and civilian attorneys have been able to avoid fiscal law issues, it is clear that the law of money is extremely important to the accomplishment of the mission in the high operations tempo and continued draw-downs of today. Understanding and dealing with fiscal law issues are much less com-

plicated than one might think. As with other areas of the law, there is a basic framework upon which to build.

Three statutes that serve as an important part of the framework for the proper use of the appropriations made by Congress are the Purpose Statute,² the Anti-Deficiency Act (ADA),³ and the Miscellaneous Receipts Statute (MRS).⁴ While the Purpose Statute and the ADA have both been the subject of several articles, neither of these statutes is widely understood. The MRS is an equally important part of the framework of appropriations, yet even less attention has been paid to the MRS and the issue of augmentation of appropriated funds. Indeed, many military practitioners are unfamiliar with the issues in fiscal law governed by these three fiscal law principles, until they find themselves facing an ADA investigation⁵ or an augmentation issue.⁶

One of the most difficult challenges in dealing with an MRS issue is that there is no single reference source.⁷ The exceptions to the MRS are scattered throughout the United States Code and Public Law. Another problem is that this area of the law changes constantly. Not only must one keep up with the impact of the statutory changes, but one must keep up with recent General Accounting Office (GAO) decisions. While it is impossible for this article to cover every exception to the MRS,⁸ the

1. This is a fictitious organization.

2. 31 U.S.C. § 1301(a) (1994).

3. *Id.* § 1341; *see id.* §§ 1342, 1517.

4. *Id.* § 3302(b). There are other statutes that are equally important in analyzing fiscal law issues. *See* The Bona Fide Needs Statute, *id.* § 1502(a); The Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688 (1997); 31 U.S.C. § 1512(c)(2) (1994). The facts involved in each specific issue will determine what parts of the framework practitioners must use to answer the particular question asked.

5. For example, an ADA investigation is required when an agency's officer or employee makes or authorizes an obligation or expenditure that exceeds the amount available in an appropriation or fund. *See* 31 U.S.C. § 1341(a)(1)(A). Another example of when an ADA investigation would be required is when an agency's officer or employee involves the government in a contractual obligation for payment of money before an appropriation is made, unless otherwise authorized by law. *See id.* § 1341(a)(1)(B).

6. An augmentation occurs when an agency takes an action which increases the amount of funds available in an agency's appropriation. This normally occurs in one of two ways, which are discussed later in this article. *See infra* notes 13-14 and accompanying text.

7. There are two references that may be used for starting points in analyzing an MRS problem. The GAO discusses augmentation of funds in one of its publications. *See* 2 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6, § E (2d Ed. 1992) [hereinafter RED BOOK] (This book is often referred to as the GAO “Red Book.”). The Army Judge Advocate General's School, Contract Law Department's Fiscal Law Deskbook is another excellent resource when confronted with an MRS issue. *See* CONTRACT L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-506, FISCAL LAW COURSE DESKBOOK (May 1996).

8. For example, there is an MRS exception at 10 U.S.C. § 423 (1994) that deals with the use of proceeds from counter-intelligence operations of the military departments to fund those types of operations until the funds are no longer needed.

first goal is to familiarize the military practitioner with the MRS and the exceptions that are most common to military practice.

The second goal of this article is to suggest a four-step process military practitioners may use as a framework for analyzing MRS issues they may encounter in everyday practice. This four-step process can serve as a general template when trying to analyze an MRS augmentation issue. The four-step process begins with determining what appropriation is being augmented. Second, determine if there is a specific statutory exception granted by Congress which allows the money to be retained in that appropriation rather than returning the money to the Treasury as a miscellaneous receipt. Third, if there is no specific statutory authorization, determine whether there are any GAO decisions creating an exception to the MRS. Fourth, when no exception can be found, look to see if there is any alternative to receiving money.

Background

In the United States government, Congress has the power of the purse.⁹ “No money shall be drawn from the treasury except in consequence of appropriations made by law.”¹⁰ Therefore, it is Congress that determines what level of appropriations any given agency shall receive. A basic principle of fiscal law is that augmentation of appropriations is not permitted. An augmentation of an appropriation occurs when an agency takes an action which increases the amount of funds available in an

appropriation.¹¹ This can result in the agency spending more money than was originally appropriated by Congress.¹²

It is possible to have an augmentation of funds resulting from either a violation of the Purpose Statute or the MRS. A Purpose Statute augmentation occurs when one appropriation is used to pay the costs associated with the purposes of another appropriation.¹³ An augmentation in violation of the MRS occurs when an agency receives and retains funds from a source outside the appropriations process rather than forwarding the funds to the General Fund of the U.S. Treasury as miscellaneous receipts.¹⁴

Legislative History and Purpose of the MRS

Prior to the enactment of the MRS in 1849, government officials would collect money owed to the United States and use the funds to pay various expenses, including their own salaries in some instances, rather than forwarding the money and drawing against a fund established for payment of salaries and expenses.¹⁵ By passing the MRS, Congress was reasserting control over the public purse and preventing unchecked spending on the part of the Executive Branch. Today, the MRS is codified at 31 U.S.C. § 3302(b) and provides that “all money received by government agents or officials from any source must be deposited in the Treasury as soon as practicable.”¹⁶

There are penalties associated with violating the statute, such as “removal from office or forfeiture of money, in any amount, to the Government held by the official or agent to

9. For an excellent article on Congress' power of the purse, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

10. U.S. CONST. art. I, § 9, cl. 7.

11. Availability of Receipts from Synthetic Fuels Projects for Contract Admin. Expenses of the Dep't of Treasury, Office of Synthetic Fuels Projects, B-247644, 72 Comp. Gen. 164 (Apr. 9, 1993).

12. This may lead to a violation of the Antideficiency Act. 31 U.S.C.A. §§ 1341, 1517 (1996). See Gary L. Hopkins and Robert M. Nutt, *The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51 (1978).

13. For example, the nonreimbursable use of a sending agency's employees, whose wages are paid by the sending agency, by a receiving agency results in an improper use of the sending agency's funds and an unlawful augmentation of the receiving agency's appropriations. Department of Health and Human Servs.—Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (Mar. 20, 1985). See Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (June 9, 1986) (statutory authority did not allow the transfer of 15 to 20 National Labor Relations Board administrative law judges on a nonreimbursable basis); U.S. Gov't Printing Office, B-247348, 1992 WL 152986 (Comp. Gen. June 22, 1992) (nonreimbursable detail of Government Printing Office (GPO) employee pursuant to a settlement agreement made under Title VII of the Civil Rights Act violates statutory prohibition against using GPO employees to do work other than public printing and binding and illegally augments another agency's appropriation). *But see*, 3 U.S.C. § 112 (1994) (providing authority for nonreimbursable details to the White House); Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1987 WL 101529 (Comp. Gen. Jan. 30, 1987) (detailing of Schedule C employees to an agency other than the one to which they have been appointed); Details to Cong'l Comms., B-230960, 1988 WL 227433 (Comp. Gen. Apr. 11, 1988) (detail of agency employees to Congressional committee is appropriate, provided that the detail furthers the purposes for which the agency's appropriations are available).

14. For example, the “interest earned on unauthorized loans made by an agency pursuant to a grant program become receipts that should be forwarded to the treasury.” Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (May 11, 1992). See Use of Appropriated Funds by the Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (June 9, 1988) (payments received by the Air Force for its capital improvement expenditures in providing space for civilian child care centers must be deposited in the Treasury as miscellaneous receipts).

15. The Act of March 3, 1849, 9 Stat. 398 (providing that all funds received from customs, sale of public lands, and all miscellaneous sources be paid to the Treasury). For example, the legislative history discusses customs officers who had authority to collect various customs and import duties and retained the money to pay their salaries and expenses.

which they may be entitled.”¹⁷ The money collected under this provision must be deposited into the General Fund of the United States Treasury as a miscellaneous receipt, absent any exception.

Over the years, the GAO has interpreted the MRS and its application. The GAO repeatedly has held that it is money, not other types of property, received by governmental agencies that triggers the prohibition.¹⁸ It is critical in analyzing an MRS problem to remember that, in most instances, the augmentation issue arises when dealing with the acceptance of money.

Application of the MRS—Statutory Exceptions

Over the years, Congress, for a variety of reasons, recognized that it was desirable to provide executive agencies with some statutory exceptions to the MRS. These exceptions allow the agencies to keep the money rather than forwarding it to the General Fund of the United States Treasury.¹⁹

Several of the statutory exceptions enacted by Congress have an impact on the contracting practices of the Department of Defense (DOD). Every day, military attorneys use two of the exceptions to the MRS discussed in the following paragraphs, the Economy Act and the Project Order Statute, without much thought as to the underlying MRS issue.

Appropriated Funds Contracts

The Economy Act. The Economy Act provides statutory authority for interagency orders.²⁰ Using the Economy Act, any governmental agency may order goods or services from any other governmental agency.²¹ The statute requires the ordering agency to reimburse the servicing agency for the goods or services provided.²² The servicing agency may retain the money, depositing it into the same appropriation which was used to obtain the goods or services. If the servicing agency is unable to deposit the money into the appropriation which was used to perform the Economy Act order, the agency must forward the money to the Treasury.²³ To deposit the money into an appropriation which had not been used for the order would result in an improper augmentation.²⁴

Project Orders. The Project Order Statute, which is similar to the Economy Act, provides authority for the ordering of goods or services between the military departments and government-owned and government-operated establishments within the DOD.²⁵ In passing the Project Order Statute, Congress gave the departments and agencies within the DOD the authority to conduct business with each other, allowing the servicing agency to retain funds in its appropriation paid by the ordering agency without violating the MRS.²⁶

16. 31 U.S.C. § 3302(b) (1994) (“Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”). 31 U.S.C. § 3718(b) provides authority for agencies to contract for collection services. These contracts can be for the recovery of indebtedness or to locate or to recover assets of the United States. This does not cover any debts owed to the Internal Revenue Service. Section (d) provides that the fee for this contract can be paid from the amount recovered. *See* GSA Transp. Audit Contracts, B-198137, 64 Comp. Gen. 366 (Mar. 20, 1985) (use of proceeds recovered from carriers and freight forwarders for services to recover delinquent amounts owed to the United States). *See also* Acceptance of Payment by Commercial Credit Card, B-177617, 67 Comp. Gen. 48 (Nov. 6, 1987) (credit card company commissions must be paid from agency’s current operating appropriations, rather than be deducted from the credit card transaction itself).

17. 31 U.S.C. § 3302(d).

18. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (July 12, 1988).

19. It should be noted that what Congress giveth, Congress can taketh away. For example, in 1992, Congress added a provision to the Arms Export Control Act that allowed the DOD to use money received from the sales of tanks, infantry fighting vehicles, and armored personnel carriers for upgrades to those vehicles. *See* 22 U.S.C. § 2761(j) (Supp. IV 1992). This provision worked as an exception to the miscellaneous receipts statute until it was deleted. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 112, 110 Stat. 206 (1996).

20. 31 U.S.C. § 1535.

21. *Id.* § 1535(a).

22. *Id.* § 1535(b). *See* Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-1 CPD ¶ 287.

23. For example, this might occur if the money is to be deposited into a closed appropriation. Since the closed appropriation is no longer available for use, the money must be forwarded to the General Fund of the Treasury as a miscellaneous receipt.

24. Hypothetically, the Air Force (a DOD agency) places an order with the NASA (a non-DOD government agency) for the purpose of obtaining some research. The Air Force would reimburse the NASA for the services procured, and the NASA would deposit the money into the appropriation used to pay for the services. The GAO has held that the Economy Act, not the Project Order Statute, applies to DOD orders to non-DOD agencies. *See* General Counsel, Library of Congress, B-246773, 72 Comp. Gen. 172 (May 5, 1993).

25. 41 U.S.C. § 23 (1994). Project Order authority for the Coast Guard is found at 14 U.S.C. § 151 (1988). Government-owned and government-operated establishments are also referred to as GOGOs.

The New Kid in Town. A new exception to the MRS appeared in the 1997 National Defense Authorization Act (NDAA).²⁷ The NDAA adds a new code section, 10 U.S.C. § 2482a, which appears to create the equivalent of the Project Order Statute and the Economy Act for the Defense Commissary Agency and Nonappropriated Fund Instrumentalities (NAFIs). This new section allows NAFIs to enter into contracts or agreements with other agencies and instrumentalities within the DOD or with another federal department, agency, or instrumentality to provide or obtain goods or services that are beneficial to the efficient management and operation of the exchange system or the morale, welfare, and recreation system.²⁸ While the new section does not specifically mention reimbursement of the costs to the servicing agency, it makes sense only if it is read and interpreted as an exception to the MRS just like the Economy Act and the Project Order Statute.²⁹

Revolving Funds. Revolving Funds were created by Congress to provide agencies with a management tool in the form of “working capital funds”³⁰ or “management funds”³¹ that provide for the operation of certain activities. Revolving funds are normally established with an initial appropriation from Congress. Once the revolving fund is established, any payment

received for goods or services provided through the revolving fund are then deposited back into the revolving fund.³² The Defense Business Operating Fund (DBOF)³³ is an example of a working capital revolving fund. Customer agencies place their orders with the DBOF and pay the DBOF for the goods or services upon receipt.³⁴ Since these revolving funds are authorized by Congress, they may be terminated at any time by Congress.³⁵

A Problem Area for Appropriated Funds Contracting: Nonappropriated Funds Contracts

Normally, the MRS applies only to appropriated funds contracting. However, there are some “cross-over”³⁶ nonappropriated funds (NAF) contracts for services which are impacted by the MRS. How can this happen? It can happen through the combining of appropriated and nonappropriated fund needs for services into a single solicitation.³⁷ In *Scheduled Airline Traffic Offices, Inc. v. Department of Defense*,³⁸ a DOD agency’s appropriated fund contracting officer attempted to combine requirements for both official and unofficial travel services into one solicitation.³⁹ The solicitation required the concession fee paid for official travel to be forwarded to the General Fund of

26. Hypothetically, the Army (a DOD agency) may contract with the Air Force (a DOD agency) to provide some maintenance for its helicopters. Assuming the project order is properly completed, the Army pays the Air Force for the maintenance performed and the Air Force places the money into the appropriation used for obtaining such services. Again, if for some reason they cannot deposit the funds into the appropriation that was charged to obtain the service, then the money must be forwarded to the Treasury for deposit as a miscellaneous receipt. The GAO has held that the Project Order Statute applies between DOD and DOD GOGOs. See *General Counsel, Library of Congress*, B-246773, 72 Comp. Gen. 172 (May 5, 1993).

27. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 341, 110 Stat. 2488-2489 (1996).

28. *Id.*

29. To interpret the new section otherwise would render it unusable. The whole idea behind this new provision was to give these entities the tools to allow more efficient management and to promote efficiency in their operations. See H.R. REP. NO. 104-563, at 278, 110 Stat. 2989 (1996). The statute also appears to authorize NAFIs to sell to appropriated fund activities. Normally, NAFIs are not subject to the requirements of the MRS, and selling goods or services to appropriated fund activities should not cause them to fall within the requirements of the MRS.

30. 10 U.S.C. § 2208 (1994).

31. *Id.* § 2209.

32. *Id.* § 2208(h).

33. The DBOF was established by Congress on 1 October 1991, by combining nine different stock and industrial funds into the one fund. The DBOF was codified as an entity in 1996 at 10 U.S.C. § 2216. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 371, 110 Stat. 186 (1996).

34. There are numerous other revolving funds scattered throughout the United States Code. See 31 U.S.C. § 3720 (1988) (authorizing agency heads to establish a Cash Management Improvements Fund for collection of payments); 42 U.S.C. § 10601 (1994) (authorizing the Crime Victims Fund). See also National Technical Information Serv.—Use of Customer Advance Deposits For Operating Expenses, B-243710, 71 Comp. Gen. 224 (Feb. 10, 1992) (discussing the National Technical Information Service’s use of money deposited into a revolving fund created by 15 U.S.C. § 1526 (1994)) and Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (Dec. 13, 1960) (discussing the Veterans Administration’s use of funds deposited into a revolving supply fund created by 38 U.S.C. § 5011 (1994)).

35. For example, the Panama Canal Commission Fund was terminated, and the unappropriated balance was transferred to the Panama Canal Revolving Fund. See 22 U.S.C. § 3712(a)(2) (1994). While the Panama Canal Commission Fund was not named a revolving fund, it was a fund used to obligate appropriations. The same principle would apply to the Panama Canal Revolving Fund, which will no longer be needed at some point in the future.

36. The term “cross-over” is used to identify those nonappropriated funds (NAF) contracts that are solicited and/or administered by an appropriated fund contracting officer. This is required by some service regulations when the NAF contract exceeds a certain dollar threshold or when the NAF contracting officer does not feel he has the expertise to compete the contract in question. See U.S. DEP’T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION: NONAPPROPRIATED FUND CONTRACTING, paras. 1-8d and 3-11 (10 Oct. 1990); U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 64-301, NONAPPROPRIATED FUND CONTRACTING, para. 5 (18 Apr. 1994); U.S. DEP’T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. 5301.602-1 (May 1, 1996). This term should not be read to imply that appropriated funds are used to fund the NAF contract.

the Treasury and the concession fees for the unofficial travel would be deposited into the local morale fund.⁴⁰ The court stated, "we have no doubt that concession fees for unofficial travel constitute money for the Government within the meaning of the statute."⁴¹ As a result, the court held the money was a miscellaneous receipt and that it was being improperly diverted from the General Fund of the Treasury. The court ordered that the funds be deposited into the Treasury and remanded the case to the district court.⁴²

Other Areas of Application in Government Practice

Most military practitioners would reason that since the MRS is a fiscal principle, it must impact only on contracting issues. Nothing could be further from the truth. In fact, the MRS impacts on many areas of military practice. Congress has given executive agencies numerous statutory exceptions to handle underlying MRS issues in handling claims issues, gifts, property law issues, environmental law, and foreign relations.

Claims

Recovering Health Care Expenditures. Most attorneys who have been claims officers have dealt with the health care recov-

ery program. In enacting 10 U.S.C. § 1095,⁴³ Congress recognized the need to recover military health care expenditures from third party payers. In order to provide incentives for the military services to engage in more aggressive recovery of money spent for health care, Congress created an exception to the MRS under 10 U.S.C. § 1095(g).⁴⁴ This provision of the statute allows "the military medical facility to retain amounts collected from third party insurers⁴⁵ for medical treatment provided to eligible recipients and credit them to the facility's operation and maintenance appropriation."⁴⁶

A New Day in Recovering Pay? A new exception was created by Congress in the 1997 NDAA in the area of claims recoveries. An amendment to 42 U.S.C. § 2651 allows the United States "to [recover] from a third party the pay of members of the uniformed services as a result of tortious infliction of injury or disease."⁴⁷ As a result:

[The] United States has an independent right to recover from the third party, the third party's insurer, or both, the amount equal to the total amount of pay that accrues or is accrued for the period that the member is unable to perform duties as a result of the

37. With the continuation of budget and personnel down-sizing, it is tempting to become creative in generating additional funds for very important morale, welfare, and recreation quality of life programs. However, great care should be taken in the mixing of the appropriated and nonappropriated funds needs for service. The courts have found these types of arrangements to be a violation of the MRS in the past. It is wise to consult the appropriate agency regulation and to seek guidance from higher headquarters before issuing the solicitation. *See also* *Reeve Aleutian Airways, Inc. v. Donald E. Rice*, 789 F. Supp. 417 (D.D.C. 1992) (failing to cite any statutory authority, solicitation requiring contribution to morale fund violated the MRS); *Motor Coach Industry, Inc. v. Dole*, 725 F.2d 958 (4th Cir. 1984) (holding that the Federal Aviation Administration's diversion of airport-user fees to purchase buses violated the MRS).

38. 87 F.3d 1356 (D.C. Cir. 1996).

39. Initially, Scheduled Airline Traffic Offices (SATO) filed two protests with the GAO. The GAO denied both of these protests. *See* SATO, Inc., B-257292.5, Sept. 21, 1994, 94-2 CPD ¶ 107 (SATO challenge to solicitation); SATO, Inc., B-253856.7, Nov. 23, 1994, 95-1 CPD ¶ 33 (SATO challenge to award). The GAO's decisions were upheld in an unreported decision by the United States District Court for the District of Columbia. *See* SATO v. Department of Defense, Civ. A. No. 94-2128 (JHG), 1994 WL 715608, at *1 (D.D.C. Dec. 9, 1994).

40. *See Scheduled Airline Traffic Offices, Inc.*, 87 F.3d 1356.

41. *Id.* at 1362. The court focused on the fact that the fees generated for the morale, welfare, and recreation account were derived from a government procurement contract where travel agents paid fees in consideration for government resources (i.e., the right to occupy agency office space, to utilize government services associated with that space, and to serve as the exclusive on-site travel agent).

42. The district court ordered the DOD to deposit all unofficial travel money received after 5 July 1996 into the United States Treasury. The district court further enjoined the DOD from considering, in the solicitation of a contractor for official travel services, the amount of concession fees offered or paid for unofficial travel services. *See Scheduled Airline Traffic Offices v. Department of Defense*, C.A. No. 94-2128 (JHG) (D.D.C. Nov. 25, 1996).

43. 10 U.S.C. § 1095 (Supp. V 1993). *See* *Collection From Third Party Payers of Reasonable Costs of Healthcare Services*, 32 C.F.R. § 220 (1996).

44. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 727(a)(2), 103 Stat. 1480-81 (1989).

45. The definition of third party insurer has been expanded to include workers' compensation programs or plans. *See* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 735(b), 110 Stat. 2598-99 (1996) (amending 10 U.S.C. § 1095(h)(1)). *See also* Affirmative Claims Note, *Medical Payments Coverage and 10 U.S.C. § 1095*, ARMY LAWYER, Dec. 1996, at 37.

46. 10 U.S.C. § 1095(g) (Supp. I 1989). *See* U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS, para. 5.20 (1 Mar. 1997) (providing guidance on depositing collections). If the military treatment facility recovers more than the amount demanded, the excess should be forwarded as miscellaneous receipts. If 10 U.S.C. § 1095 is not the basis for recovery, the money must be forwarded as a miscellaneous receipt.

47. National Defense Authorization Act for Fiscal Year 1997, § 1075, 110 Stat. at 2661-63.

injury or disease and is not assigned to perform other military duties.⁴⁸

Any money that the United States recovers under this provision “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned at the time of the injury or illness, as determined under regulations prescribed by the Secretary concerned.”⁴⁹ This change means that the unit suffering the loss of the services of the member may now recover the costs of the loss and retain it in the appropriate appropriation.

Gifts

Most military practitioners are familiar with the DOD guidance and service regulations concerning gifts.⁵⁰ However, many practitioners do not stop to think about the fiscal implications of accepting a gift.⁵¹

Defense Cooperation Account. Normally, “agencies are not allowed to accept gifts absent statutory authority because it

would constitute an improper augmentation of funds.”⁵² In enacting 10 U.S.C. § 2608,⁵³ Congress provided authority for the Secretary of Defense “to accept monetary gifts or real or personal property for defense programs, projects, and activities from any person, foreign government, or international organization.”⁵⁴ “Any money that is given as gifts may not be expended until appropriated by Congress.”⁵⁵ However, “property that is given may be used in the form in which it was given, sold or otherwise disposed of, or converted into a more usable form.”⁵⁶ The statute was recently amended to allow the Secretary to “accept from any foreign government or international organization any contribution of services made by such foreign government or international organization for use by [the] DOD.”⁵⁷

The Handling of Property

Occasionally, an MRS issue arises when dealing with the replacement of damaged government property or the proceeds from the rental of government property.

48. *Id.* at 2661-62. A new subsection (b) is added to 42 U.S.C. § 2651. The old subsection (b) is redesignated as subsection (d).

49. *Id.* § 1075(f)(2), 110 Stat. at 2662. As of the date of the submission of this article, the author had been unable to find any published guidance on this issue from the offices of the Secretary of Defense or of the service secretaries. However, the United States Army Claims Service (USARCS) has provided some guidance on this statutory change. See Affirmative Claims Note, *Lost Wages Under the Federal Medical Care Recovery Act*, ARMY LAW., Dec. 1996, at 38. The USARCS has taken the position that the recovered money goes into the installation operations and maintenance account, even though the money used to pay the soldier came from the Army Military Pay Account. While this means that the money goes into a different account, this interpretation appears to be consistent with the intent of the statute—to reimburse the affected command.

50. See U.S. DEP’T OF ARMY, REG. 1-100, ADMINISTRATION, GIFTS AND DONATIONS (15 Dec. 1983); U.S. DEP’T OF ARMY, REG. 1-101, ADMINISTRATION, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 June 1981); U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE (19 July 1994); U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-901, GIFTS FROM FOREIGN GOVERNMENTS (21 July 1994). These regulations cover gifts to the agency and to the individual. Nonappropriated Fund Instrumentalities have different rules, and practitioners should consult the appropriate agency NAFI regulation or instruction.

51. A gift, donation, or bequest has been defined by the GAO as a gratuitous conveyance or transfer of ownership in property without any consideration. See Secretary of the Interior, B-56153, 25 Comp. Gen. 637 (Mar. 7, 1946). The GAO has also defined what is not a gift. See Federal Communication Commission—Acceptance of Rent-Free Space and Servs. at Expositions and Trade Shows, B-210620, 63 Comp. Gen. 459 (June 28, 1984) (free exhibit space and appurtenant services at industry trade shows, exhibitions, conventions, and other similar events does not involve an augmentation, because there is no donation of funds).

52. Chairman, United States Civil Serv. Comm’n, B-128527, 46 Comp. Gen. 689 (Mar. 7, 1967). See Edward P. Borland, Chairman, Subcomm. on HUD-Independent Agencies—Comm. on Appropriations, House of Representatives, B-225986, 1987 WL 101592 (Comp. Gen. Mar. 2, 1987).

53. 10 U.S.C. § 2608 (Supp. III 1991). This statute was enacted as part of a joint resolution continuing appropriations for fiscal year 1991. The same resolution contained a supplemental appropriation for Operation Desert Shield for fiscal year 1990, as well as addressing other issues. The statute replaced 50 U.S.C. § 1151, which was repealed. The old act had allowed the acceptance of conditional gifts to further defense efforts. See 22 U.S.C. § 2697 (1988) (gift acceptance authority for the Secretary of State). The authority to administer the account, to receive payments and contributions to the account, and to deposit money into and to pay from the account have been delegated to the Under Secretary of Defense (Comptroller)/Chief Financial Officer. See U.S. DEP’T OF DEFENSE, DIR. 5118.3, DELEGATIONS OF AUTHORITY, para. 1j (1997).

54. 10 U.S.C. § 2608(a) (Supp. III 1991). The Department of the Air Force has issued instructions for handling gifts from foreign governments under 10 U.S.C. § 2608. See U.S. DEP’T. OF AIR FORCE, AIR FORCE INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE, para. 1.8 and ch. 4 (19 July 1994).

55. 10 U.S.C. § 2608(c).

56. *Id.* at § 2608(d).

57. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1063, 110 Stat. 2652-53 (1996). However, the amendment does not appear to provide authority for the Secretary to accept services from an individual person. Acceptance of voluntary services are generally prohibited, absent specific statutory authority. See 31 U.S.C. § 1342 (1994). However, in some instances, Congress has granted some agencies the authority to accept both gifts and voluntary and uncompensated services. See 15 U.S.C. § 2076(b)(6) (1994) (giving the Consumer Product Safety Commission the authority to accept gifts and voluntary and uncompensated services).

Real Property Rental. Historically, any money received from real property leases was forwarded to the Treasury as miscellaneous receipts. Congress changed this practice by enacting 10 U.S.C. § 2667(d)(1).⁵⁸ This provision allows the military to deposit into special accounts all money received from the leasing of any non-excess real property.⁵⁹ The money deposited from rentals shall be used for facility maintenance, repair, or environmental restoration.⁶⁰

*Real Property Damage Recovery.*⁶¹ If a military member causes damage to DOD real property, an exception to the MRS allows the service “to deduct the money from the member’s pay to repair or replace the property.”⁶² But what about damage caused by someone who is not a member of the armed forces? Congress addressed this issue by providing another exception to the MRS. Now “any amount recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.”⁶³

Personal Property. Prior to the enactment of 10 U.S.C. § 2575,⁶⁴ the proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation were considered miscellaneous receipts that had to be forwarded to the Treasury. Now these proceeds may be deposited into the installation operations and maintenance (O&M) account.⁶⁵ The proceeds should first be used “to pay for any costs associated with

collecting, storing, and disposing of the property.”⁶⁶ Any funds remaining after reimbursement of costs may be deposited into the accounts of morale, welfare, and recreation activities.⁶⁷

The Environment

Environmental considerations impact the practice of law in the DOD every day. Again, many military practitioners do not think about how the MRS impacts various environmental programs and how they may be accomplished.⁶⁸

Turning Garbage Into Money. In an effort to provide the DOD with incentives to establish aggressive recycling programs, Congress created an exception to the MRS at 10 U.S.C. § 2577.⁶⁹ Paragraph (b)(1) allows the installation to take the proceeds from these programs and deposit them into their O&M accounts to cover the costs of operations, maintenance, and overhead associated with processing recyclables. Further provisions allow for the use of up to fifty percent of these funds to pay for installation projects for pollution abatement, energy conservation, or occupational health and safety. The remaining proceeds go into installation morale, welfare, and recreation funds.⁷⁰ However, should any military installation accumulate a balance at the end of any fiscal year in excess of \$2 million,

58. 10 U.S.C. § 2667(d)(1) (Supp. II 1990). This authority also applies to any personal property that is under the control of the department in question. The use of proceeds resulting from the transfer, sale, or use of excess property is governed by the provisions of 40 U.S.C. § 485(h) (Supp. II 1990).

59. Money received under a lease that are amounts paid for utilities and services furnished lessees by the Secretary; under agricultural or grazing leases; or at bases earmarked for closure under the Defense Base Closure and Realignment Act of 1990 may not be deposited into the special account. See 10 U.S.C. §§ 2667(d)(1)(A), (d)(4)-(5); Pub. L. No. 104-106, § 2831(a)(2), 110 Stat. 558 (1996).

60. 10 U.S.C. § 2667(d)(1)(B) states that 50 percent of the amount available shall be allocated to the military installation where the leased property is located and the other 50 percent shall be available to the military department concerned.

61. Currently, there is no statutory exception to the MRS to allow the retention of funds to replace or to repair government-owned personal property. See *infra* notes 94-96, 104-106 and accompanying text.

62. 10 U.S.C. § 2775 (1994). Service regulations should be consulted to determine the extent of a member’s individual liability.

63. *Id.* § 2782. The statute specifically excepts the provisions set forth in 10 U.S.C. § 2775 for recovery from a member of the armed forces. *Id.*

64. *Id.* § 2575, as amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 374(a)(1), 110 Stat. 281 (1996).

65. *Id.* § 2575(b)(1).

66. *Id.* § 2575(b)(1)(a).

67. *Id.* § 2575(b)(1)(b).

68. One issue that is not covered in this article is whether the creation of Supplemental Environmental Projects (SUPs) diverts money from the Treasury in violation of the MRS. These SUPs are normally created as part of a settlement relating to fines and penalties associated with violating certain environmental statutes such as the Clean Water Act and the Clean Air Act. See Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENVTL. L. REV. 789 (1995); Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6 VILL. ENVTL. L.J. 243 (1995); see also Michael Paul Stevens, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits*, 10 GA. ST. U. L. REV. 757 (1994); Elizabeth R. Thagard, *The Rule That Clean Water Penalties Must Go to the Treasury and How to Avoid It*, 16 HARV. ENVTL. L. REV. 507 (1992).

69. 10 U.S.C. § 2577 (1994).

70. *Id.* § 2577(b)(2)-(3).

all money in excess of \$2 million shall be forwarded as miscellaneous receipts.⁷¹

Separate Environmental Restoration Accounts. In the 1997 NDAA, Congress established separate environmental restoration accounts for each military department.⁷² In addition, Congress addressed the issue of credits for amounts recovered. "Any amounts that are recovered under a CERCLA⁷³ response action or any amounts recovered from a contractor, insurer, surety or other person to reimburse the military department for any expenditure for environmental response activities, shall be credited to the appropriate environmental restoration account."⁷⁴

Foreign Relations

The impact of recent world events and changing foreign policies have had an impact on the practice of military law. Deployments are numerous, as the United States projects its military presence around the world to fulfill its foreign policy objectives. The MRS impacts on some of these operational issues, and military practitioners must remember that the MRS still applies. In order to assist the DOD in accomplishing its mission, Congress has provided numerous exceptions to the MRS.⁷⁵

Host Nations Help Defray Expenses. In order to safeguard United States interests, the armed forces have been deployed with increasing frequency. In 10 U.S.C. § 2350k,⁷⁶ Congress provides an exception to the MRS that allows a nation hosting United States forces to contribute to the costs of the relocation of those forces within the host country. "[T]he Secretary of Defense may now accept contributions from any nation of or in support of the relocation of elements of the armed forces from or to any location within the nation."⁷⁷

To Transfer or Not To Transfer? That is The Question. In an effort to further the intent of the Foreign Assistance Act (FAA), Congress created numerous exceptions to the MRS. One such exception is found at 22 U.S.C. § 2392.⁷⁸ This exception gives the President the authority to transfer State Department funds to other government agencies, including the DOD. Such "reimbursement shall be in an amount equal to the value of the defense articles or the defense services, or other assistance as furnished, plus any incidental expenses arising from or incident to operations."⁷⁹ Based upon this authority, augmentation of an appropriation will not be considered a violation of the MRS.⁸⁰

Application of the MRS—Exceptions Recognized By The Comptroller General

71. *Id.* § 2577(c). This means that any funds in excess of a \$2 million balance is to be forwarded to the General Fund of the Treasury.

72. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 321, 110 Stat. 2477-79 (1996).

73. CERCLA stands for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. This act is found at 42 U.S.C. §§ 9601-75 (1994).

74. National Defense Authorization Act for Fiscal Year 1997, § 321, 110 Stat. at 2477-79.

75. Congress has also provided statutory exceptions for the DOD to carry out its mission and to avoid augmentation issues that violate the Purpose Statute. Numerous exceptions have been created which allow the detailing of any agency's personnel in an effort to further the aims of the Foreign Assistance Act. For example, 22 U.S.C. § 2387 (1994) allows the detail of officers and employees to foreign governments or foreign government agencies so long as there is no oath of allegiance to, or compensation from, the foreign country. *See also id.* § 2388 (detailing officers or employees to serve with international organizations, or to serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organization); *id.* § 1451 (allowing details of United States employees to provide scientific, technical, or professional advice to other countries with the exception of assistance to the training of the armed forces of those countries); *id.* § 712 (allowing detail of members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or any other country during a war or declared national emergency).

76. 10 U.S.C.A. § 2350k (West Supp. 1997).

77. *Id.* § 2350k(a). It is this authority which allows the Secretary of Defense to enter into discussions with the host nation concerning the costs of relocating United States troops within the host country. As a result of the terrorist bombing of the Khobar Towers compound near Dhahran, Saudi Arabia, it was decided that United States troops needed to be relocated within the host nation of Saudi Arabia. The cost splitting agreement, which then Secretary of Defense Perry negotiated with Saudi Arabian Minister of Defense Prince Sultan, could be based upon this gift acceptance authority. *See* CNN with Associated Press, *U.S. and Saudis to Share Cost of Moving Troops* (visited July 31, 1996) <<http://www.cnn.com/world>>.

78. 22 U.S.C. § 2392.

79. *Id.* § 2392(d).

80. Another exception is found at 22 U.S.C. § 2357, which allows any governmental agency to furnish commodities or services on a reimbursable basis to friendly foreign countries and to international organizations for purposes consistent with Subchapter I of the FAA. Reimbursement under this provision cannot be waived. Under this provision, whether or not an appropriation is allowed to be reimbursed or the money is required to be forwarded to the Treasury depends on when the reimbursement is received. Initially, reimbursements will be deposited into the agency account. Funds that are received within 180 days of the end of the fiscal year may be deposited into the current account. However, funds received outside that 180-day period will be forwarded to the General Fund of the Treasury as a miscellaneous receipt. *See* GAO REP. NO. GAO/NSIAD-94-88, *COST OF DOD OPERATIONS IN SOMALIA*, Mar. 1994.

Case law from the GAO has created numerous exceptions to the MRS. Many of these exceptions focus on contracting. However, the GAO also recognizes the need for exceptions in the handling of government property.

In The Contracting Arena

Replacement Contracts. The GAO recognizes an exception allowing an agency “to retain recovered excess procurement costs to fund replacement contracts.”⁸¹ This allows the agency to maintain the funds and to use them to fund replacement contracts whether the money is reimbursement for damages due to defective workmanship or the government is terminating the contract for default. There is a caveat to this exception; “[t]he agency may only retain the amount of funds necessary to reprocur the goods or services that would have been provided under the original contract.”⁸² “Any excess money will be considered miscellaneous receipts and must be deposited into the Treasury.”⁸³

Refunds. Occasionally an agency will be entitled to a refund.⁸⁴ As a general rule, in the absence of express statutory authority, agencies must credit refunds to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired.⁸⁵ There may be times when the agency decides not to retain the refund for various

reasons. If that is the case, the agency may forward the refund to the General Fund as a miscellaneous receipt.⁸⁶

Erroneous Payments, Overpayments, or Advance Payments. A number of GAO cases discuss when an agency may retain an erroneous payment, overpayment, or advance payment. In *Department of Justice—Deposit of Amounts Received from Third Parties as Payment for Damage for Which Government Has Already Compensated Plaintiff*,⁸⁷ the GAO determined that “it was proper for the agency to retain the amount recovered from carriers or insurers up to the amount spent in advance payment to an employee due to damage or loss of the employee’s personal property.”⁸⁸ In *International Natural Rubber Organization—Return of United States Contribution*,⁸⁹ the GAO held that “repayments to the United States, which were actually excess or overpayments made to the International Natural Rubber Organization, could be retained in the appropriation from which those dues are paid.”⁹⁰

False Claims Act Recovery. In *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*,⁹¹ the GAO held that agencies may retain certain portions of a damage award or settlement made pursuant to the False Claim Act (FCA).⁹² The agency may “retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses.”⁹³ If “treble damages and penalties are collected pursuant to the statute, those funds must be deposited as miscellaneous receipts.”⁹⁴

81. Bureau of Prisons—Dispositions of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sept. 28, 1983, 62 Comp. Gen. 678, 84-1 CPD ¶ 91.

82. *Id.* at 682-83. See also Army Corps of Engineers—Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 (Sept. 8, 1986) (agency may retain money recovered as additional costs to reimburse appropriation).

83. Bureau of Prisons—Dispositions of Funds Paid in Settlement of Breach of Contract Action, 62 Comp. Gen. at 678, 683.

84. In this context, refunds are amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, to include authorized advances. See RED BOOK, *supra* note 7, at 6-109. Embezzled funds which are recovered are also considered refunds. See Appropriation Accounting Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130. The rule on refunds also applies when dealing with a credit. For example, a refund in the form of a “credit” for utility overcharges. See RED BOOK, *supra* note 7, at 6-111.

85. Secretary of War, B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944). There are also statutory provisions for various agencies on this point. See Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-52, § 625, 109 Stat. 502 (1995); Department of the Interior—Disposition of Liquidated Damages Collected for Delayed Performance, B-242274, 1991 WL 202596 (Comp. Gen. Aug. 27, 1991) (liquidated damages may only be credited to the appropriation charged with the contract that resulted in the damages).

86. Accounting for Rebates from Travel Management Center Contractors, B-217913.3, 73 Comp. Gen. 210 (June 24, 1994).

87. B-205508, 61 Comp. Gen. 537 (July 19, 1982).

88. *Id.* at 540.

89. B-207994, 62 Comp. Gen. 70 (Dec. 6, 1982).

90. *Id.*

91. B-230250, 69 Comp. Gen. 260 (Feb. 16, 1990).

92. 31 U.S.C. § 3729 (1994). See 18 U.S.C. § 287 (1994) (concerning criminal penalties associated with false claims act prosecutions).

93. *Federal Emergency Management Agency*, 69 Comp. Gen. at 264.

Other Areas of Application in Governmental Practice

The most common noncontracting issues impacted by the exceptions created by the GAO are those involving the handling of damaged government property. In *Defense Logistics Agency—Disposition of Funds Paid In Settlement of Contract Action*,⁹⁵ the GAO examined the disposition of funds recovered by an agency for damage to government property. The GAO concentrated on the definitions of “refund” and “receipt” of money from sources outside the appropriations process. The GAO ruled that the “funds received could not be credited to the appropriation charged, as the damage was unrelated to the contract’s performance.”⁹⁶ The fact that the agency received a check in the amount of \$114,934.14 from the insurer, which resulted in the check being treated as money received by the agency, was crucial to the GAO’s decision. Since money could not be credited to an appropriation, the money had to be forwarded as miscellaneous receipts.⁹⁷

So what happens if an agency receives property instead of cash for damaged property? May the agency keep property offered in lieu of cash to replace government property damaged by a negligent third party? The GAO has held that “when the agency receives replacement property for damaged government property, the agency may retain the property.”⁹⁸ It is important to remember, as the GAO points out,⁹⁹ that the MRS applies to augmentation of an appropriation with money from a source outside the appropriations process. Therefore, the agency may keep the property replaced in this instance. In practice, it makes no difference whether it is the negligent third party or his insurer who is replacing the damaged government property.

Analyzing MRS Issues

So, where does a military practitioner start in trying to determine the appropriate course of action in the scenarios described at the beginning of this article? The four-step process proposed in the introduction can assist the military practitioner in analyzing MRS augmentation issues. First, determine what appropri-

ation is being augmented. Next, is there a specific statutory exception granted by Congress which allows the money to be retained in the appropriation to be augmented rather than requiring the money to be forwarded to the Treasury as a miscellaneous receipt? Third, if there is no specific statutory authorization, are there any GAO decisions which create an exception to the MRS? Fourth, when no exception can be found, is there any alternative to receiving money?

Damage to a Government Computer

What about the traveler who discovered the damaged government laptop, filed the claim, and agreed to accept a check? Is it really in the government’s best interest to accept a check if the goal is to get the laptop repaired or replaced?

First, identify the appropriation that will be augmented by acceptance of the check. In this instance, assume that installation O&M funds have been used to purchase the laptop.¹⁰⁰ Does the traveler have authority to augment the installation O&M account? Remember that the money cannot be retained in the installation O&M account to repair or to replace the laptop without an exception to the MRS. Absent an exception, any amount received should be treated as a miscellaneous receipt and forwarded to the Treasury.

The next two steps are to determine whether there is a statutory or GAO-created exception to the MRS available so that the unit may retain the money in its O&M appropriation. Based upon the discussion of the statutory and GAO-created exceptions for handling property, above,¹⁰¹ practitioners should quickly conclude that there is no statutory or GAO-created exception to receive money in this instance.

Finally, if there is no exception allowing the retention of the money, is there an alternative for replacing or repairing the laptop? Until Congress sees fit to allow the retention of money paid for personal property damage, the answer here must be a creative “yes.” The GAO has repeatedly held that the MRS applies only to the receipt of money. How does the traveler manage to avoid the problem of receiving a check? He should

94. *Id.*

95. B-226553, 67 Comp. Gen. 129 (Dec. 11, 1987).

96. *Id.* at 130.

97. This is true of any funds received as a result of a pro-government claim against any third party for damage to government-owned personal property. See U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS, para. 4.14 (1 Mar. 1997).

98. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (July 12, 1988).

99. *Id.*

100. For the purpose of illustrating this problem, assume the computer was properly purchased with O&M funds.

101. See *supra* notes 61-63, 95-99 and accompanying text.

work a settlement with the airline or its insurer which allows the traveler to take the computer to an authorized repair shop and to have the repair shop bill the airline directly. Another solution would be for the airline to replace the unit's computer by purchasing another computer and providing it in settlement for the damage.

Use of Gifts Provided by International Private Organizations

How should one handle the offer made by the Friends of the United States to purchase and donate six new Pentium computers? Normally, the first step would be to identify the appropriation that the unit is seeking to augment. However, because of the statutory exception that will apply in this instance, the local unit's appropriation is not a factor.

Next, practitioners should look to see if there is either a statutory or GAO-created exception available to justify the acceptance of the gifts from the IPO. In this instance, research should lead to the statutory exception provided at 10 U.S.C. § 2608 discussed previously in this article.¹⁰² After coordination through appropriate channels, it is possible for the DOD to accept the gift of the six computers. Remember, this authority allows the Secretary of Defense to accept gifts of money or real or personal property for use in defense programs, projects, or activities.

Proposed Changes for the Future?

Many contracting officers believe that Congress should consider changing the law to allow "cross-over" nonappropriated contracts to be combined by appropriated fund contracting

officers when needed.¹⁰³ In this time of down-sizing and doing more with less, it makes no sense to require separate contracts and administration when time and money may be saved by joint solicitation and administration. A statutory change would allow an appropriated fund contracting officer to solicit and to administer certain types of contracts that overlap some services paid for by appropriated funds.¹⁰⁴ This would provide an exception to the MRS. Congress could add safeguards against potential abuse by adding restrictions to the percentage of commission that would be passed through the contract to the morale, welfare, and recreation fund.¹⁰⁵

As to damage to government property, Congress has provided the DOD with many exceptions that have allowed the DOD to recover for damage to its real property and, in some instances, personal property, in the form of equipment and furniture when associated with damaged real property. Indeed, under the Report of Survey system, government employees and members of the armed forces are required to reimburse the government for any lost, damaged, or stolen property.¹⁰⁶ It is time for Congress to take the next step and to allow the DOD an exception which would enable local units who suffer damage to accept funds to repair or to replace government-owned personal property.¹⁰⁷ Any concerns for potential abuses can be dealt with by simply providing statutory language requiring any funds not used to repair or to replace the damaged or destroyed property to be forwarded as miscellaneous receipts.¹⁰⁸

Changes also appear likely in the area of procurement fraud. "Congress has asked the Secretary of Defense to report on the possibility of allowing the DOD to retain a portion of any recovery made under the procurement fraud statutes to provide the incentive to encourage more aggressive procurement fraud recovery programs."¹⁰⁹ "It has been suggested that the DOD

102. See *supra* notes 52-57 and accompanying text.

103. As a result of a district court order, a working group was formed to propose draft legislation to amend 10 U.S.C. Chapter 147. The proposed draft legislation would allow the Secretary of Defense to procure official and unofficial travel services in a single solicitation. It would also allow any commissions or fees received to be deposited in the respective appropriated or nonappropriated fund account. Additionally, based upon the recommendations of the working group, the Office of the Undersecretary of Defense for Acquisition and Technology issued interim guidance in March 1997 concerning the procurement of travel services.

104. This would squarely address the court's concern in *Scheduled Airline Traffic Offices*, as Congress would be basically authorizing appropriated fund support to the NAF by providing: free space and services for the contractor, the time of the appropriated funds contracting officer, and the ability to be the exclusive on-site travel agency.

105. For example, they could mandate a fixed NAF concession fee of no more than two or three percent. This would take the NAF concession fee out of the equation in considering the awarding of a contract; it would be the same for all bidders, and there would be no "incentive" for awarding the contract to someone whose bid included a higher concession fee for NAF. The focus would still be who provided the best deal for the dollar on the appropriated fund solicitation. There is no language in the draft legislation to address this concern, which was articulated by the court in *Scheduled Airline Traffic Offices*.

106. See U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY FOR AIR FORCE PERSONNEL, para. 16.2.13 (1 July 1996). See also U.S. DEP'T OF DEFENSE, DEFENSE FINANCE AND ACCOUNTING SERVICE-DENVER CENTER REG. 177-102, COMMERCIAL TRANSACTIONS AT BASE LEVEL, pt. V (31 Jan. 1996).

107. This is the next logical step, given the newly-expanded authority provided under 10 U.S.C. § 2575. If an installation can retain the proceeds from the sale of lost, abandoned, or unclaimed nongovernment personal property, the installation should be able to accept and to retain funds to repair or to replace damaged government-owned personal property. New authority in this area could serve as an additional incentive for aggressive pro-government claims collection, as has been seen in both the hospital recovery and recycling programs.

108. If the unit decides not to have the item repaired or replaced, the unit should not be allowed a windfall, and the money should be considered a miscellaneous receipt.

retain three percent of single damage funds or \$500,000, whichever is less, recovered in fraud cases which would be retained in the installation O&M appropriation.”¹¹⁰ This would be similar in concept to the program that is currently in place for the hospital recovery program and would be more than sufficient incentive to energize these programs in a fashion similar to the hospital recovery program. Additionally, this would allow the retention of a part of the costs associated with the fraud programs which are mandated by Congress in the first place.¹¹¹

Conclusion

The MRS impacts much more of military practice than contracts and claims. It is an important part of the fiscal law framework and the practice of military law. The exceptions to the MRS, both statutory and GAO-created, make it much easier for the DOD and its departments to perform their missions without running afoul of the MRS. Every military practitioner should be familiar with the basics of the MRS, its applications, and the exceptions that impact many areas of their practice. From contracts to claims, and in fulfilling the military’s assigned missions in the foreign relations arena, the MRS can have an impact on the way the mission is accomplished and its success.

109. Major Timothy J. Pendolino et al., *The Fiscal Year 1996 Department of Defense Authorization Act: Real Acquisition Reform in Hiding?*, ARMY LAW., Apr. 1996, at 19 (citing the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1052, 110 Stat. 186, 440 (1996)). See S. REP. NO. 104-112, at 218 (1995).

110. *Id.*

111. This would allow for fraud recoveries in concert with, and in addition to, the use of the False Claims Act. See *supra* notes 91-94 and accompanying text.